

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY,

Petitioner,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

PETITIONER'S BRIEF IN REPLY
TO THE BRIEFS IN OPPOSITION TO PETITION

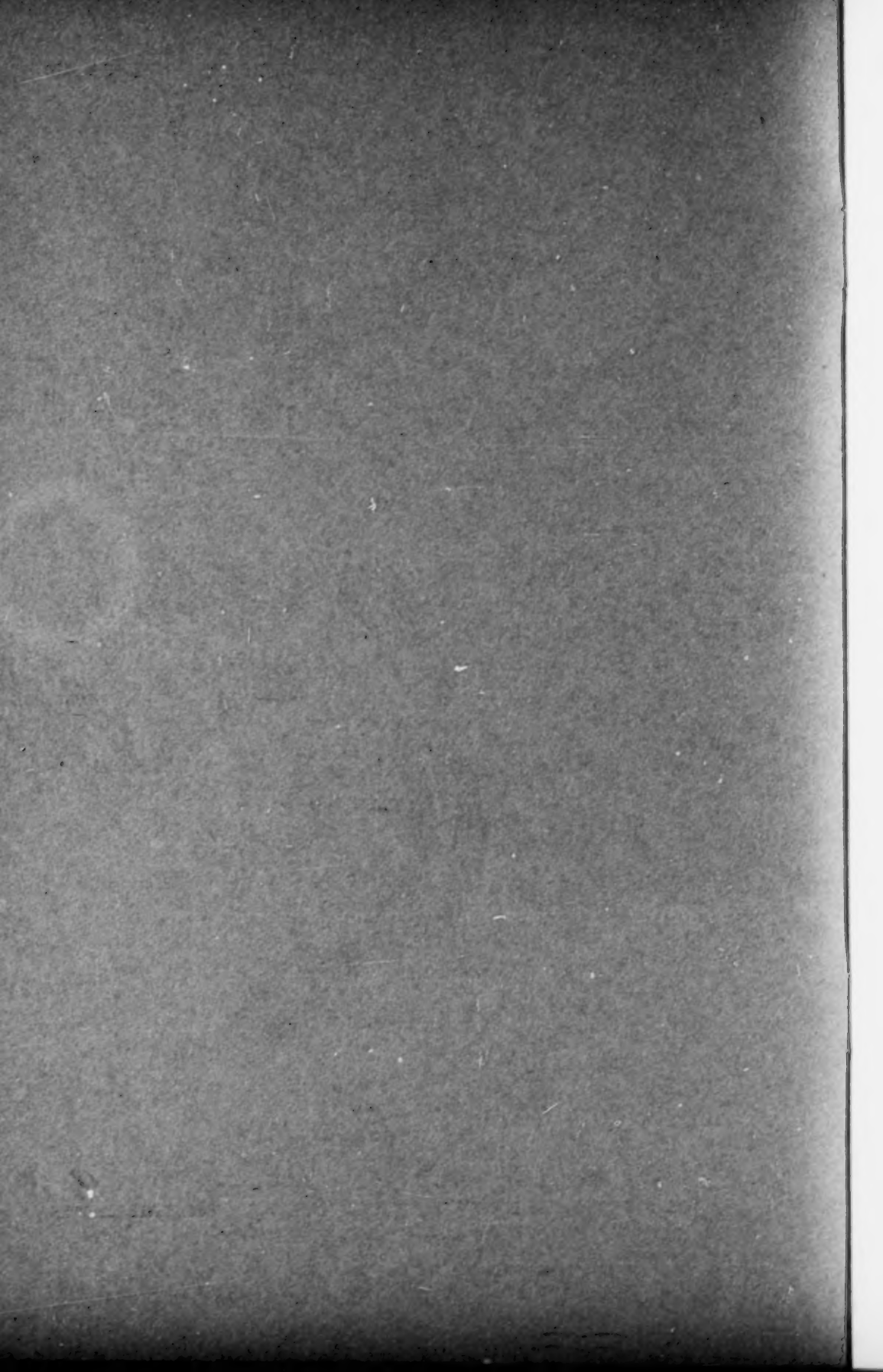
RALPH J. MOORE, JR.
(Counsel of Record)
RANDOLPH LEE ELLIOTT
SHEA & GARDNER
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000

JAMES P. DALEY
STUART F. GASSNER
RONALD J. CUCHNA
CHICAGO & NORTH WESTERN
TRANSPORTATION COMPANY
One North Western Center
Chicago, Illinois 60606
(312) 559-6100

FRITZ R. KAHN
VERNER, LIPPERT, BERNHARD,
McPHERSON & HAND
901 15th Street, N.W.
Washington, D.C. 20005
(202) 371-6000

*Attorneys for Chicago & North
Western Transportation Company*

April 12, 1990



The Petition includes a currently accurate list naming all parent companies and subsidiaries of Petitioner Chicago and North Western Transportation Company as required by Rule 29.1.

IN THE
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No. 89-1209

CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY,
Petitioner,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

**PETITIONER'S BRIEF IN REPLY
TO THE BRIEFS IN OPPOSITION TO PETITION**

Petitioner Chicago and North Western Transportation Company respectfully submits this brief in reply to the briefs of the Federal Respondents and respondents Railway Labor Executives' Association ("RLEA") and United Transportation Union ("UTU") in opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case. The petition presents two

important issues for review: that venue in the court of appeals was improper and that this case is not justiciable. Despite the importance of these issues and the clear conflict in the courts of appeals, respondents have opposed the petition on procedural grounds that do not withstand scrutiny.

1. The Federal Respondents oppose the petition on the ground that petitioner did not raise the two questions presented here in a petition for certiorari filed at an earlier stage in this case. They do not contend that petitioner has waived either of its contentions or prejudiced any party; rather, they claim that petitioner has engaged in “[p]iecemeal litigation” calling for “an uneconomical use of the Court’s limited resources” (Brief for the Federal Respondents in Opposition 7).

The “[p]iecemeal litigation” claim fundamentally mischaracterizes the situation here. Petitioner has never sought, nor has this Court given, plenary consideration of the merits of this case. Petitioner’s earlier petition noted simply that the Court had granted certiorari in *Pittsburgh & Lake Erie Railroad v. Railway Labor Executives’ Association*, 109 S. Ct. 489 (1988), on the same issues presented by the merits of this case and was holding in abeyance three other petitions raising the same or similar issues (see Petition, No. 88-1706, at 5). It therefore asked the Court to treat this case like the other pending petitions and dispose of the case in accordance with its decision in *Pittsburgh & Lake Erie* (*id.* at 5-6). The Court did just that: after the *Pittsburgh & Lake Erie* decision, 109 S. Ct. 2584 (1989), the Court granted the petition, vacated the judgment of the court of appeals, and remanded the case for further consideration in light of *Pittsburgh & Lake Erie*. 109 S. Ct. 3209 (1989). It is axiomatic that such an order merely notes the similarity in issues presented but does not rep-

resent a determination of the merits or a suggestion that the intervening precedent necessarily controls disposition of the case. See *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964). In the special situation of this case, where reconsideration of the merits by the court of appeals was likely to be necessary, it would have been premature to ask the Court to give plenary consideration to the issues of jurisdiction and venue in this case.

2. Respondents RLEA and UTU, on the other hand, argue that petitioner waived the venue argument by failing to present the issue in the earlier petition for certiorari and by failing to ask the court of appeals to reconsider the issue after this Court remanded the case (Brief of Respondents Railway Labor Executives' Association and United Transportation Union in Opposition to Petition 11). Respondents do not claim prejudice by petitioner's actions, and there is no authority to support their waiver theory.¹ It simply is not the rule that a petitioner is required, on pain of waiver, to petition for certiorari on all possible grounds following an initial court of appeals decision. As in this case, such a rule often would require the Court's needless consideration of issues which are not ripe for plenary review by this Court. See, e.g., *Panama R. Co. v. Napier Shipping Co.*, 166 U.S. 280, 283-84 (1897).

¹ *Peoria & Pekin Union Ry. v. United States*, 263 U.S. 528 (1923), cited by respondents (see Br. in Opp. 11 n.7), is distinguishable, since it involved a single appeal to the Supreme Court without a remand to the lower court. The Court held that parties waived a venue argument by not raising it in the district court, and that the United States, which did not waive the venue issue in the district court, nonetheless had not filed a cross-appeal on the issue, and thus could not press it on appeal. 263 U.S. at 535-36. In this case, petitioner raised the venue issue in the court of appeals and has presented it for review in the instant petition.

CONCLUSION

For the reasons set forth above and in the petition,
the writ of certiorari should be granted.

Respectfully submitted,

RALPH J. MOORE, JR.
(Counsel of Record)
RANDOLPH LEE ELLIOTT
SHEA & GARDNER
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000

JAMES P. DALEY
STUART F. GASSNER
RONALD J. CUCHNA
CHICAGO & NORTH WESTERN
TRANSPORTATION COMPANY
One North Western Center
Chicago, Illinois 60606
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